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IN THE
Supreme Court of the United States

October Term, 1992

CITY OF CHICAGO,

Petitioner,

against

ENVIRONMENTAL DEFENSE FUND, INC.,

Respondent.

**WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

BRIEF FOR AMICUS CURIAE STATE OF NEW YORK

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i.

Question Presented

Whether Section 3001(i) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6921(i), which provides that a "resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes", exempts from hazardous waste regulation the ash produced from burning household and non-hazardous commercial and industrial solid waste at such a facility where the facility maintains in place procedures to assure that hazardous wastes are neither accepted at nor burned at the facility.

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Citation of Opinions and Judgments Below

The opinion of the Court of Appeals upon remand from this court is reported at 985 F. 2d 303. The initial opinion of the Court of Appeals is reported at 948 F.2d 345. The opinion of the District Court is reported at 727 F. Supp. 419.

No. 92-1639

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Respondent.

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

Brief for *Amicus Curiae* State of New York

Interest of the *Amicus Curiae*

The New York State Department of Environmental Conservation (“Department”) estimates that, within several years, the waste-to-energy facilities in the State will annually produce approximately 1,500,000 tons of incinerator

ash. It is unclear what percentage of this ash would fail Toxicity Characteristic Leaching Procedure ("TCLP") testing, the new testing procedure adopted by the United States Environmental Protection Agency ("EPA"). If large quantities of incinerator ash must be placed in hazardous waste landfills, the Department is concerned that this will pose a heavy financial burden without significantly increasing the degree of environmental protection afforded by New York's current ash disposal methods.¹

Given the volume of ash produced from municipal resource recovery facilities and the limited amount of space available in New York's commercial hazardous waste landfill (the only such landfill in the Northeast), the Department is also concerned that there will be insufficient space in that landfill for hazardous waste produced by industry if the ash produced from municipal resource recovery facilities must be placed in hazardous waste landfills. New York's "Capacity Assurance Plan", required under 42 U.S.C. § 9604(c)(9), the Superfund Amendments and Reauthorization Act, in order to maintain the State's ability to obtain federal funds for cleanup of hazardous waste sites, assured EPA that the State would have treatment or disposal facilities with adequate capacity for all hazardous wastes that are reasonably expected to be generated within the State during the next 20 years. The capacity of New York's hazardous waste landfill, which receives shipments of hazardous waste from generators in New York, many other states, and Canada, is 1.1 million cubic yards. In September of 1991, in conjunction with submission of the Capacity Assurance

¹Vendors are claiming a new technology exists to render the ash non-hazardous. In the event this technology fails, however, the ash would, under the decision issued by the Seventh Circuit, be destined for hazardous waste landfills.

Plan to EPA, the Department imposed an annual ceiling of approximately 325,000 tons on the landfill.

Furthermore, a finding that such ash is not exempt from hazardous waste regulation would have serious financial implications for municipal solid waste landfills in the event they are deemed to be inactive hazardous waste sites. Over the last several years, ash from waste-to-energy facilities which incinerate municipal solid waste has been disposed of in municipal solid waste landfills throughout the nation.

The Department is also concerned that interpretation of Section 3001(i) to require handling the ash produced at municipal resource recovery facilities as hazardous waste will frustrate compliance with the State's solid waste management policy, codified in New York's Environmental Conservation Law ("ECL") § 27-0106, which identifies resource recovery as a management technique which may be preferable to landfills in some circumstances.

ECL § 27-0106, contained within New York's Solid Waste Management Act, provides, in pertinent part:

In the interest of public health, safety and welfare and in order to conserve energy and natural resources, the state of New York, in enacting this section, establishes as its policy that:

1. The following are the solid waste management priorities in this state:

- (a) first, to reduce the amount of solid waste generated;
- (b) second, to reuse material for the purpose for which it was originally intended or to recycle material which cannot be reused;
- (c) third, to recover, in an environmentally acceptable manner, energy from solid waste that cannot be economically and technically reused or recycled; and
- (d) fourth, to dispose of solid waste that is not being reused, recycled, or from which energy is not being recovered, by land burial or other methods approved by the department.

* * *

3. This policy, after consideration of economic and technical feasibility, shall guide the solid waste management programs and decisions of the department and other state agencies and authorities.

This policy was adopted after years of consideration and discussion among the State and its municipalities. Municipalities throughout the State have adopted local solid waste management plans which are consistent with the State's Solid Waste Management Act. Consequently, many local management plans prefer resource recovery over landfilling of raw waste, based upon local situations.

Since the incineration of raw municipal solid waste reduces its volume by 90% and weight by between 70% and 75%, landfilling all municipal solid waste without incineration would exacerbate New York's crisis in municipal solid waste landfill capacity.

The economic consequences of handling ash residue as hazardous waste would impose an enormous burden on the owner or operator of resource recovery facilities which would in turn be passed on to the public. Hazardous waste landfills are few, not centrally located, extremely expensive to reach and use, and short on capacity. Hazardous waste landfills are few because they are not only extremely expensive to construct and operate, but they are also extremely difficult to site in the first instance or to expand because of strong local opposition. New York's hazardous waste landfill is located in the Niagara area, 400 miles from where most of the State's population (and municipal waste) is located.

If resource recovery facilities are deemed to be "generators" of hazardous waste, each facility would be required to pay a \$40,000 annual generator fee if over 1,000 tons per year of ash residue must be managed as a hazardous waste. ECL § 72-0402(1)(d). In addition, the facility would have to pay a special assessment in the amount of \$27 per ton of residue requiring land burial at a hazardous waste disposal facility. Added to these costs are those associated with transportation and disposal. Disposal costs at the New York hazardous waste facility are estimated to be at least \$200 per ton. Typically, the transportation cost for ash residue originating in the downstate and Long Island areas, assuming a 400 mile transport, would be almost \$84 per ton. These additional transportation and disposal costs, which would be

borne by the public whose waste is incinerated at resource recovery facilities, are unnecessary from an environmental point of view since the special waste handling requirements now in effect in New York are adequate to protect the environment at significantly less cost.

Like a number of States, New York requires that the ash from municipal resource recovery facilities be managed, treated, and disposed of as a special waste in order to protect the environment.² This special waste management program, promulgated at Title 6 of the New York Code of Rules and Regulations, § 360-3.5, includes:

- ash must be stored inside a building
- transportation requirements include water-tight and leak-resistant containers or trucks;
- disposal must be as follows:
 - for fly ash only, disposal in a fly ash only landfill equipped with a double composite liner and leachate collection and leak detection systems above each composite liner

²All states, as of October 9, 1993, must comply with the minimum national landfill standards set forth in 40 CFR Part 258. Such standards include location restrictions (40 CFR §§ 258.10-258.16), operating criteria (40 CFR §§ 258.20-258.29), design criteria (40 CFR 258.40), groundwater monitoring and corrective action criteria (40 CFR §§ 258.50-258.58), closure and post-closure care (40 CFR §§ 258.60-258.61), and financial assessment criteria (40 CFR §§ 258.70-258.74). The regulations of many states, including those of New York, go beyond these minimum requirements.

- for combined ash or bottom ash, disposal in either an ash only landfill equipped with a single composite liner and leachate collection system or codisposal with municipal waste in a double composite lined landfill with leachate collection and leak detection systems above each composite liner
- for fly ash treated in such a way that it immobilizes the release of heavy metals under acidic and non-acidic conditions, codisposal with municipal waste in a double composite-lined landfill with redundant leachate collection and leak detection systems

Given these existing protective requirements for ash disposal, should the holding of the Seventh Circuit be held to be the law of the land, only a speculative or marginal enhancement of environmental protection would be gained, but it would be gained at an enormous cost to the public.

Statement of the Case

On January 27, 1988, plaintiffs Environmental Defense Fund, Inc. and Citizens For A Better Environment (collectively referred to as "EDF") brought this suit asserting that the City of Chicago violated provisions of Subtitle C of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*, because it failed to handle the ash produced at the Northwest Facility, a municipal solid waste incinerator, as a hazardous waste pursuant to RCRA.

RCRA, which deals with the generation, treatment, storage, transportation, and disposal of hazardous and non-hazardous waste, was enacted in 1976. Subtitle C of RCRA

requires EPA to identify and list hazardous wastes and to promulgate standards governing hazardous waste generators and transporters and owners and operators of hazardous waste treatment, storage, and disposal facilities. Waste must be treated as hazardous if it is a "listed" hazardous waste, i.e., it is a waste listed in the regulations, or, if it is not listed but it exhibits the "characteristics" of hazardous waste. The "characteristics" are four: ignitability, corrosivity, reactivity, or toxicity. These are specifically defined. If it is a hazardous waste, the waste is subject to stringent regulation under Subtitle C of RCRA. If not, it is regulated by the less stringent, and therefore far less expensive, provisions of Subtitle D.

If the ash produced at a resource recovery facility is regulated as a hazardous waste, the facility would be required to handle the ash as a hazardous waste, that is, obtain a permit to store it as a hazardous waste in special storage facilities replete with extensive pollution prevention devices and procedures, manifest it (provide a cradle to grave paper trail of its movement), and arrange for transport via a permitted hazardous waste transporter for eventual disposal at a hazardous waste landfill.

The 1976 RCRA statute did not explicitly deal with municipal or household waste and whether such waste or ash produced from its incineration is hazardous. In 1978, however, in draft regulations, EPA proposed the "household waste exclusion" to exempt household waste from regulation as a hazardous waste. EPA took the position that RCRA's legislative history indicated that Congress did not intend that the type of waste substances normally used in households be subjected to regulation under RCRA, and therefore households, apartment houses, condominiums,

and hotels were not subject to regulation under RCRA. The final rule, promulgated in 1980, adopted the household waste exclusion. In support of its position, EPA maintained that Congress intended to exclude the household waste-stream from regulation as a hazardous waste under Subtitle C, and therefore it retained its exempt status even through eventual conversion into ash.

In 1984, Congress adopted the Hazardous and Solid Waste Disposal Amendments to RCRA and included a specific provision entitled, "Clarification of Household Waste Exclusion":

3001(i). [42 U.S.C. § 6921(i)] Clarification of Household Waste Exclusion.

A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subtitle, if—

(1) such facility—

(A) receives and burns only—

(i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources) and

(ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and

(B) does not accept hazardous wastes identified or listed under this section, and

(2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

In bringing this lawsuit, EDF asserted, and the City did not deny, that the ash produced at the facility contains levels of lead and cadmium that exceed the legal thresholds defining wastes as hazardous. The City did assert, however, and EDF accepted, that the facility only accepted household and non-hazardous commercial and industrial waste, and that the facility had in place procedures designed to ensure that no hazardous wastes were accepted or burned at the facility.³ Based on these facts, the City asserted that it was exempted from the requirements of Subtitle C of RCRA, which regulates generators of hazardous wastes, because it therefore came within the exemption contained within 42 U.S.C. § 6921(i) [Section 3001(i) of RCRA], enacted in 1984.

The district court entered judgment in favor of the City on August 20, 1990. The United States Court of Appeals for the Seventh Circuit reversed and entered judgment for the plaintiffs on November 19, 1991.

³EDF asserted, and the City does not deny, that heavy metals, including cadmium and lead, those detected at the City's facility, are produced during incineration of non-hazardous waste because metal does not burn but becomes concentrated when the other constituents in the waste are burned.

On November 16, 1992, this Court granted defendants' petition for certiorari, vacated the judgment, and remanded the case to the United States Court of Appeals for the Seventh Circuit for further consideration in light of the memorandum of the Administrator of the Environmental Protection Agency, dated September 18, 1992, regarding exemption for Municipal Waste Combustion Ash from Hazardous Waste Regulation Under RCRA Section 3000(i).

Upon the remand from this Court, the Court of Appeals for the Seventh Circuit entered an unpublished order on January 12, 1993 and again reversed the district court. The court of appeals issued a published decision on January 29, 1993. This Court then granted the second petition for a writ of certiorari.

Summary of the Argument

This Court should reverse the judgment entered by the United States Court of Appeals for the Seventh Circuit in this case and follow the decision issued in 1991 by the Court of Appeals for the Second Circuit in *Environmental Defense Fund, Inc., v. Wheelabrator Technologies, Inc.*, 931 F.2d 211, cert. denied, ____ U.S. ___, 112 S.Ct. 453, 116 L.Ed.2d 471 (1991). The Second Circuit held that when Congress enacted Section 3001(i) of the Hazardous and Solid Waste Amendments Act in 1984, Congress consciously exempted resource recovery facilities burning household waste and commercial and industrial non-hazardous waste from the requirements of Subtitle C, which regulates hazardous waste, provided that the facilities maintained in place procedures to assure that hazardous wastes were not accepted at or burned at the facility. Thus, Congress knowingly ratified EPA's previously announced inter-

pretation of RCRA as including a general exemption of household waste from the requirements of Subtitle C of RCRA, *and* extended the exemption to include facilities burning non-hazardous commercial and industrial waste, provided that the facility maintains in place procedures to assure that hazardous waste is neither accepted at or burned at the facility.

ARGUMENT

Ash From Resource Recovery Incinerators That Burn Household Waste And Non-Hazardous Industrial/Commercial Waste Is Exempt From Regulation As A Hazardous Waste Under Subtitle C Of The Resource Conservation And Recovery Act

In 1991, the United States Court of Appeals for the Second Circuit correctly decided the issue presented to this Court in this case. *Environmental Defense Fund, Inc., v. Wheelabrator Technologies, Inc.*, 931 F.2d 211, *cert. denied*, ____ U.S. ___, 112 S.Ct. 453, 116 L.Ed.2d 471 (1991). In that case, the Second Circuit held that when Congress enacted Section 3001(i) of the Hazardous and Solid Waste Amendments Act in 1984, Congress consciously exempted resource recovery facilities burning household waste and commercial and industrial non-hazardous waste from the requirements of Subtitle C, which regulates hazardous waste, provided that the facilities maintained in place procedures to assure that hazardous wastes were not accepted at or burned at the facility. Thus, Congress knowingly ratified EPA's previously announced interpretation of RCRA as including a general exemption of household waste from the requirements of Subtitle C of RCRA, *and* extended the exemption to include facilities burning non-hazardous commercial and industrial waste,

provided that the facility maintains in place procedures to assure that hazardous waste is neither accepted at nor burned at the facility. This Court should reverse the judgment entered by the United States Court of Appeals for the Seventh Circuit in this case and instead follow the 1991 decision by the Court of Appeals for the Second Circuit.

In that case, as here, EDF argued that the ash produced during the incineration process made the resource recovery facility a "generator" of hazardous wastes, and thus made the facility subject to RCRA Subtitle C's regulatory requirements for generators because Section 3001(i) did not mention an exemption for those generating hazardous wastes at such facilities. Like the City in this case, the defendant in that case, Wheelabrator Technologies, argued that the facility was a "manager" of hazardous wastes and Section 3001(i) expressly exempted municipal facilities "otherwise managing" hazardous wastes from Subtitle C's regulatory requirements.

In making its decision in 1991, the Second Circuit adopted the reasoning used by the United States District Court for the Southern District, where the case had originated. 725 F. Supp. 758. The district court found that the amendment was ambiguous on its face and that the meaning of the term "otherwise managing hazardous wastes" was not ascertainable without turning to the legislative history. 725 F. Supp. at 764.

The district court in the *Wheelabrator* case relied heavily on the Report prepared by the Senate Committee on the Environment and Public Works, which was prepared contemporaneously with the proposed Section 3001(i) and which accompanied the amendment in its travels through the legislative process. The district court properly chose not

to rely on statements made by legislators some years after the amendment was enacted urging a different legislative intent. 725 F. Supp. at 769-770.

The Senate Committee report provided context for the amendment and specifically used the term "generator", upon which EDF placed so much emphasis. 725 F. Supp. at 765. That report stated:

The reported bill adds a subsection (d) [sic] to section 3001 to clarify the coverage of the household waste exclusion with respect to resource recovery facilities recovering energy through the mass burning of municipal solid waste. This exclusion was promulgated by the Agency [EPA] in its hazardous waste management regulations established to exclude waste streams generated by consumers at the household level and by sources whose wastes are sufficiently similar in both quantity and quality to those of households.

Resource recovery facilities often take in such "household wastes" mixed with other, non-hazardous waste streams from a variety of sources, other than "households", including small commercial and industrial sources, schools, hotels, municipal buildings, churches, etc. It is important to encourage commercially viable resource recovery facilities and to remove impediments that may hinder their development and operation. New Section 3001(d) [sic] clarifies the original intent to include within the household waste exclusion activities of a *resource recovery facility* which recovers energy from the mass burning of household waste and non-hazardous waste from other sources.

All waste management activities of such a facility, including the *generation*, transportation, treatment, storage and disposal of *waste* shall be covered by the exclusion, if the limitations in paragraphs (1) and (2) of subsection (d) [sic] are met.

EDF, Inc. v. Wheelabrator, 725 F. Supp. at 765, quoting S. Rep. No. 284, 98th Cong., 2d Sess., at 61 (1983). (Emphasis supplied by district court.) The limitations in paragraphs (1) and (2) referred to are the limitations found in Section 3001(i), specifically that the facility accepts only household wastes and/or commercial or industrial non-hazardous waste, does not accept hazardous wastes from any source, and has in place procedures to assure that hazardous wastes are not received at or burned at the facility.

The court found that the Senate Report clearly expressed Congress' intent that ash "generated" during the incineration process was exempted from Subtitle C's requirements, provided that the facility did not accept hazardous waste and has in place appropriate mechanisms to ensure that no such waste is accepted. 725 F. Supp. at 765. The court found that the legislative history "makes clear that at the time of its passage, Congress intended Section 3001(i) to exempt ash from regulation under Subtitle C *in order to pave the way for increased use of the resource recovery process*". 725 F. Supp. at 770. (Emphasis added.)

The Senate-House Conference Committee adopted, without change, the version proposed by the Senate. 725 F. Supp. at 765, citing H.R. Conf. Rep. No. 1138, 98th Cong., 2nd Sess. 79, 106 (1984), reprinted in 1984 U.S. Code Cong. & Admin. News 5576, 5649, 5677. The Conference Committee Report stated that:

The Senate amendment clarifies that an energy recovery facility is exempt from hazardous waste requirements if it burns only residential and non-hazardous commercial wastes and establishes procedures to assure hazardous wastes will not be burned at the facility.

725 F. Supp. 765. The Senate version was adopted intact by the Congress. 725 F. Supp. at 765.

As the district court pointed out, Congress clearly knew that EPA had in 1980 interpreted the statute as exempting household waste, "and had it disagreed, it would have made clear its disagreement". 725 F. Supp. at 765. "Instead", continued the court, "Congress clarified its 'original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources.'" 725 F. Supp. at 765-766, quoting Senate Report No. 284 at 61.

The district court in *EDF v. Wheelabrator* also properly rejected EDF's argument, accepted by the majority of the Seventh Circuit, that the exemption contained in Section 3001(i) merely exempted facilities from regulations governing managing hazardous wastes (i.e., treatment, storage, or disposal) but not from regulations governing generating of hazardous wastes, reasoning that it was difficult to understand what, if any, benefit the facility would derive from such an exemption because a facility which did not accept or burn hazardous wastes would not be subject to regulation as a treatment, storage, or disposal facility even in the absence of the exemption. 725 F. Supp. at 763. We believe that Seventh Circuit's limited reasoning of the "managing" exemption should be rejected.

Conclusion

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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